

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TIMOTHY FRY,)	
)	
Petitioner)	
)	
v.)	Civil No. 96-0128-B
)	
JEFFREY MERRILL, WARDEN,)	
)	
Defendant)	

**RECOMMENDED DECISION TO DENY
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 following his convictions in the Maine Superior Court (Cumberland County) on August 31, 1988, on two counts of arson in violation of 17-A M.R.S.A. § 802(1)(B)(2) (Supp. 1987). He challenges the convictions on four separate grounds, namely: (1) that his convictions resulted from the use of evidence obtained pursuant to an unlawful search and seizure; (2) that his convictions were obtained pursuant to a violation of the privilege against self-incrimination; (3) ineffective assistance of counsel; and (4) the trial court committed obvious errors in ruling on the admissibility of evidence, jury instructions, and the petitioner's motion for acquittal. Having carefully reviewed the evidence, the Court recommends that the petition be denied.

I. Procedural Issues

A. Statute of Limitations

The respondent contends that this petition is barred by the statute of limitations set forth in the recent amendments to habeas corpus law. The petitioner replies that because the underlying

judgment from which he appeals was entered prior to the enactment of the recent law, his petition is not time-barred.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 101 of the Act amended 28 U.S.C. § 2244 to provide a one-year period of limitation for the filing of an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). In the case at bar, the relevant starting date for purposes of calculating the statute of limitations is July 6, 1989, the date on which the Law Court rejected the petitioner's direct appeal and the date on which the underlying criminal judgment "became final by the conclusion of direct review." 28 U.S.C. § 2244(d)(1)(A). The petition in the case at bar was filed on May 14, 1996, almost three weeks subsequent to the enactment of the new law. Even when the Court deducts the tolled period during which the petitioner pursued his motion for a new trial and a state post-conviction review proceeding, the petition is nearly four years late under the new law.

The Constitution requires, however, that statutes of limitation permit a reasonable period of time after they take effect for the commencement of suits on existing causes of action. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *see also Black v. North Dakota*, 461 U.S. 273, 286 n.23 (1983) (applying same requirement to state statutes). Finding that it would be inequitable and prejudicial to apply a new statute of limitations to a habeas claim that accrued prior to the announcement of the new rule without providing a grace period in which to file a petition on such a claim, two federal district courts have concluded that a grace period in the amount of the new one-year limitation period would be reasonable. *Duarte v. Hershberger*, 947 F. Supp. 146, 149 (D. N.J. 1996); *Flowers v. Hanks*, 941 F. Supp. 765, 771 (N. D. Ind. 1996). Thus, claims brought pursuant

to section 2254 would not be barred by the new statute of limitations if filed on or before April 23, 1997. Because the Court finds the above reasoning to be persuasive and equitable, it concludes that the petitioner's claim, filed on May 14, 1996, is not barred by the recent amendment to section 2254.

B. Procedural default

The respondent also contends that the petitioner's claims in grounds one and four concerning the introduction of evidence obtained pursuant to an unconstitutional search and seizure and the trial court's rulings regarding certain evidence and jury instructions have been procedurally defaulted due to his failure to raise them in appropriate state court proceedings. Moreover, respondent avers that petitioner has failed to demonstrate cause for the defaults and prejudice to his case as required by *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), in order to survive a default.

Petitioner's claims with respect to an unconstitutional search and seizure was not raised by him or his counsel at the pre-trial, trial, or direct appeal stages of the case. It is well settled that federal habeas corpus review is unavailable to a petitioner asserting a Fourth Amendment claim if the state courts provided a "full and fair opportunity" to litigate such a claim. *See Stone v. Powell*, 428 U.S. 465, 494-95 (1976); *Palmigiano v. Houle*, 618 F.2d 877, 880 (1st Cir. 1980). Petitioner's claim concerning the various trial court rulings was not properly preserved for appeal at the trial court level because he failed to object to them.¹ Neither claim was asserted in petitioner's petition

¹ This claim is unavailable for review by this Court because petitioner did not preserve the underlying issues for review. Because petitioner failed to object at the trial to the various rulings he challenges now, the Law Court reviewed the issues for obvious error when it considered petitioner's direct appeal. Concluding that there was no obvious error on the part of the trial court, the Law Court denied petitioner's appeal in a memorandum of decision. *State v. Gregory and Fry*, No. 5131

for a post-conviction review. "Where the petitioner--whether a state or federal prisoner--failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'" *Reed v. Farley*, 114 S.Ct. 2291, 2300 (1994) (quoting *Wainwright*, 433 U.S. at 84). Fry's petition and response suggest cause only for the failure to raise the first claim relating to the Fourth Amendment. The Court thus may not consider further the fourth claim related to the various rulings by the court.

A claim of ineffective assistance of counsel as "cause" for failure to raise a claim on state appeal must "be presented to the state courts as an independent claim" before it may be considered by the federal courts on collateral review. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Although he raised the issue of ineffectiveness of counsel, the petitioner did not raise in his petition for post-conviction review or in his notice of appeal requesting a certificate of probable cause the separate and discrete issue relating to an unconstitutional search and seizure. Nor, until now, did the petitioner raise the issue of ineffective assistance of counsel as cause for his failure to raise previously the underlying Fourth Amendment issue.² Having failed to raise the claim below, the petitioner may not now attempt to show cause or prejudice excusing the procedural default.

(Me. July 6, 1989) (mem.). Petitioner failed to raise such issues in his subsequent state post-conviction review proceeding. Absent the requisite showing of cause or prejudice, a procedural default in a state court serves as an adequate and independent state ground for the state court decision and immunizes that decision from habeas review in federal court. *Carsetti v. Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)).

² Had petitioner in fact raised the claim in his petition for post-conviction review or in his notice of appeal, this Court may well have reached the issue on its merits. See *Carsetti*, 932 F.2d at 1009-12 (order denying certificate of probable cause did not serve as a sufficiently clear and express statement to procedurally bar issue raised therein for purposes of federal habeas review).

Accordingly, the Court concludes that neither the claim relating to an unconstitutional search and seizure nor the claim relating to various of the trial court's rulings may be reached on the merits.

II. The Merits

Because he raised them in his petition for post-conviction review and exhausted his state remedies, the petitioner's remaining two claims--that his conviction was obtained by a violation of the privilege against self incrimination and that he was denied effective assistance of counsel--may be reached on the merits. The petitioner contends that he was forced against his will by his trial counsel to testify on his own behalf and that he was denied, for three main reasons, effective assistance of counsel at the trial. Respondent answers that such claims were fully and fairly litigated, and properly decided, in the state courts.

A. Self-incrimination

In his petition for post-conviction review, the petitioner averred that he was denied effective assistance of counsel at the trial because his attorney made him testify against his own wishes. It is unclear whether petitioner now seeks review of the claim pursuant to an ineffective assistance of counsel theory or whether he wishes to advance it as an independent theory of error on the part of the court. If he intends the latter approach, the claim is waived because he did not raise it at any time during the state court proceedings and has not now shown cause for the waiver. *Wainwright*, 433 U.S. at 84. If he intends instead to seek review of the claim pursuant to an ineffective assistance of counsel theory, then, for the reasons discussed below, the findings of the post-conviction court must be presumed correct.

A full hearing was held at the post-conviction proceeding, and the court made the following findings on Fry's claim:

Specifically, Mr. Fry was advised by trial counsel that he would 'sink or swim' on his testimony. Certainly, considering the state of the record prior to Mr. Fry's testimony, this appears to have been good advice. The volume of evidence against Mr. Fry makes it difficult to conceive how it can be suggested that Mr. Fry's case would have been aided by his not testifying. His testimony may not have turned out well. Apparently, there were some demeanor problems that are not entirely reflected in the written record. However, the approach which trial counsel took, planning all along to have Mr. Fry testify, certainly appears *a wholly reasonable approach to defense. Urging a defendant to take actions which appear at the time to be in the defendant's best interest is not incompetence.* (emphasis added).

Such findings, arrived at following an apparently full and fair hearing, must be presumed correct in this review. 28 U.S.C. § 2254(d). On the basis of these findings, the Court concludes that the petitioner is not entitled to relief on this issue.

B. Ineffective assistance of counsel

The petitioner contends that he was denied effective assistance of counsel at the trial in light of his counsel's failure to: (1) request discovery from the state; (2) move to suppress evidence used at the trial that had been seized in the petitioner's apartment pursuant to an arrest related to a separate charge; and (3) move to sever the petitioner's trial from that of his co-defendant. Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The post-conviction court applied this standard in denying petitioner's claim. The court made the following relevant findings with respect to petitioner's counsel's performance at the trial:

1. Failure to request discovery: "***This is a baseless claim. The record reflects nothing but that trial counsel received full cooperation from the State and was voluntarily given all discovery and allowed to review all evidence.*** With such voluntary cooperation, there is no necessity to take the court's time by filing needless motions." (emphasis added).

2. Failure to file a motion to suppress: "The record of this post-conviction proceeding fails to include evidence which would convince this court that a motion to suppress, had it been filed, would have been granted. Notably, a motion to suppress filed by the co-defendant directed to items seized from the apartment was denied. Further, although petitioner's disorderly conduct charge was dismissed, there is no evidence to suggest that the . . . arrest was not supported by probable cause or that the seizure of items from the defendant after that arrest was otherwise constitutionally defective. Thus, ***petitioner fails to prove the claim of incompetence of counsel based on failure to file a motion to suppress.***" (emphasis added).

3. Severance: "The record reflects that trial counsel was concerned that at a severed trial the co-defendant would testify adversely to Mr. Fry. At a combined trial, trial counsel guessed, correctly, that the co-defendant would not testify and that under the *Bruton*[v. *United States*, 391 U.S. 123 (1968)] rule, there would therefore be no basis to introduce the statements by the co-defendants adverse to Mr. Fry. In addition, at a combined trial, Mr. Fry's counsel planned to, and did, attempt to contrast the significant evidence specifically implicating the co-defendant and the totally circumstantial evidence implicating Mr. Fry. ***This choice to accept a combined trial--which must be judged by what is known prior to the start of the trial--was a reasonable strategic decision that in no way reflects incompetence of counsel.***" (footnote omitted) (emphasis added).

Absent an indication that the factual findings of a state court were not based on a full and fair hearing, such findings are presumed to be correct. 28 U.S.C. § 2254(d). Pursuant to *Strickland*, a counsel's strategic decisions at the trial are clothed with a presumption of reasonableness.

Strickland, 466 U.S. at 689; *see also Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993). The petitioner has failed to demonstrate that his trial counsel's performance was deficient. The petitioner raised both of the above claims at his post-conviction hearing, at which time he was represented by counsel and was afforded a full and fair opportunity for litigation of the claims. The court made specific findings with respect to each claim, and those claims now are presumed correct. The Court thus concludes that, in light of the above findings made by the state court, no unconstitutional incarceration of the petitioner may be found on the above claims.

C. Remaining claims

Finally, the petitioner moves this Court for an evidentiary hearing to clarify the record following the post-conviction hearing and for an *in camera* hearing in order to review sealed files related to the disbarment of his former trial counsel. The petitioner contends that his ineffective assistance of counsel claim may be buttressed if it is shown that his trial counsel was disbarred for reasons related to those he advances in this petition. Both motions are denied. Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that it is for the judge to determine whether an evidentiary hearing is required following a review of the record. Because the Court has been able to reach its conclusions in the present matter based on the facts of the record, there is no need to develop more facts at another hearing; such a hearing is unnecessary as only issues of law would be raised. *Townsend v. Sam*, 372 U.S. 293, 312 (1963).

III. Conclusion

For the foregoing reasons, I hereby recommend that the Court DENY the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on February 7, 1997.